IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. [illegible]

WILLIAM DOUGLAS and BENNIE WILL MEYES,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

The order of the California Supreme Court denying hearing after judgment by the District Court of Appeal was filed March 2, 1961 (R. 194).

The Opinion Below

The Opinion of the District Court of Appeal is separately set forth in the Record (R. 183-193), reported at 10 Cal. Rptr. 188.

Jurisdiction

The jurisdiction of this Court was invoked under 28 U.S.C. 1257(3); the Petition for Writ of Certiorari was granted on October 9, 1961. On the same date, an order was granted permitting petitioners leave to proceed *in forma pauperis* (R. 195).

Statement of the Case

The Trial

Petitioners were tried and convicted of thirteen felony counts.[1] At the commencement of the trial, they were represented by Los Angeles County Deputy Public Defender Norman Atkins, who asked for a continuance of trial on the grounds that: (1) He was unprepared and (2) there was a conflict of interest between petitioners and petitioner Douglas ought to be assigned private counsel.[2] The motion for continuance and for appointment of other counsel was denied (R. 36). These motions and some examination of the jury panel was had during the morning hours.

After the noon recess, the petitioners asked to have Mr. Atkins relieved as their counsel because he was not prepared to defend them ("Defendant Douglas: I would like to clarify something. As I said, I want to dismiss Mr. Atkinson [sic] for the reason that he is not properly prepared to defend me; but, now, I would like to obtain my own counsel, and I can't fight this case myself. I need counsel, but I don't think Mr. Atkinson is prepared to defend

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[1] Armed robberies, ten counts; assault with a deadly weapon, two counts; assault with intent to commit murder, one count.

[2] See California Penal Code Section 987a set forth in the Record at Pages 70-71.

me, and for that reason I would want to dismiss Mr. Atkinson" (R. 76)). After considerable palaver concerning the "unqualified" dismissal of Mr. Atkins (R. 74-83), he was relieved (R. 83).

Thereafter, each petitioner appeared *pro se* through the trial and appellate proceedings, though not by choice. They immediately (R. 98 *et seq.*) and continuously requested counsel prepared to defend them through the remainder of the trial whenever they were entitled to cross-examine[3] (R. 110, 116, 120, 125-126, 129, 132, 135-136, 138, 142, 146, 151); at the time for presentation of the defense[4] (R. 151 *et seq.*); at the time for defense argument[5] (R. 164 *et seq.*), and at motion for new trial and at time set for sentence (R. 171-175).

The Appeal

Petitioners each filed a separate Notice of Appeal (R. 24, 26); each applied for appointment of counsel on appeal and were denied counsel by the District Court of Appeal (R. 182) on the grounds that the Appellate Court had read the record after the request for counsel and came to the conclusion that " . . . No good whatever could be served by appointment of counsel" (R. 193).

Petitioner Douglas's request for a separate trial transcript to prepare his briefs on appeal was denied (R. 182) even though he was in a different prison, 119 miles away

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[3] There was no cross-examination.

[4] There was no defense.

[5] There was no defense argument.

from petitioner Meyes.[6] Although petitioner Douglas refused to adopt petitioner Meyes' brief (R. 182), the Appellate Court thought otherwise (Opinion, R. 192: "Douglas has adopted the briefs filed by Meyes").

There is a question as to whether there was ever an appellate review of petitioner Douglas's case. On the other hand, if the appellate court's reasoning is accepted, then both petitioners petitioned for a hearing in the California Supreme Court, and their petitions were denied (R. 194).

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[6] A letter from the California Department of Corrections addressed to the writer dated July 25, 1961, reads as follows:

"Dear Sir: Re: A-8164 MEYES, Bennie Will
A-55779 DOUGLAS, William

This is in reply to your letter of July 20, 1961 inquiring as to the location of the two inmates in question following their commitment in 1959.

Bennie Will Meyes A-8164:

November 3, 1959	Received at Southern Reception Guidance Center, Chino.
November 11, 1959	Transferred to Northern Reception Guidance Center, Vacaville.
December 30, 1959	Transferred to Folsom and has remained there since.

William Douglas A-55779:

November 5, 1959	Received at Southern Reception Guidance Center, Chino.
January 5, 1960	Transferred to San Quentin and has remained there since.

You will note that, other than the period from November 5, 1959 to November 11, 1959 they have been at different locations.

The distance between Folsom and San Quentin is 119 miles.

Very truly yours,

RICHARD A. McGEE
Director of Corrections

By
Peter J. Murry
Chief Records Officer"

Specification of Errors

At both the trial and appellate level, petitioners were denied assistance of counsel and due process of law.

Summary of Argument

This is an extraordinary case where two indigent defendants at the inception of a criminal trial involving thirteen felony counts were deprived of counsel by the trial court which insisted that the defendants be represented by one deputy public defender who had stated to the court that he was unprepared and that a conflict of interest existed between the defendants.

The trial court has committed egregious and reversible error and denied each of the appellants assistance of counsel and due process of law in failing to appoint separate counsel for petitioner Douglas, and in failing to grant a short continuance at the request of their counsel.

The error was further compounded by the District Court of Appeal for the State of California, Second Appellate District, Division Three, when it refused petitioner Douglas's request for a separate transcript of the proceedings had at trial where Douglas was located in a prison 119 miles away from petitioner Meyes who was in possession of the transcripts of the record; and when the court denied each petitioner's request for aid of counsel on appeal. The action of the California Supreme Court in denying a hearing was an affirmation by California's highest court that indigents are not entitled to the protection of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The facts of the instant case forcefully illustrate that due process of law requires not only that an indigent de-

fendant be given a transcript of lower court proceedings where appellate review is available, but that as a matter of right and necessity, he is entitled to appointment of counsel.

Preface to Argument

In order to more fully understand the situation—and the problems—some of the background material must be added.

On June 22, 1959, a second murder trial ended in petitioner Meyes' conviction of murder in the second degree. His co-defendant at that trial was petitioner Douglas. The victim was a Los Angeles police officer, Eugene Nash. Douglas was acquitted. The prior murder trial of both petitioners had ended in a mistrial, the jury being unable to reach a verdict.

In both murder trials, Meyes had been represented by Los Angeles County Public Defender Paul Breckinridge, and Douglas by attorney Marvin Mitchelson, co-counsel for petitioners herein.

In the murder trials, the prosecution had introduced evidence of the instant robberies and assaults (but one)[7] in an attempt to prove that defendants knew they were wanted by the police and were "lying in wait" when the police came to apprehend them, and thus establish the basis for a first degree murder charge.[8]

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[7] The facts of the murder case are reported in *People v. Bennie Will Meyes*, 198 A.C. Appellate Reports, 512. As of this writing, the petition for hearing has been taken to the California Supreme Court, but no response has been had from that Court.

For some of the *non sequitur* applications by the California courts permitting the admission of "other offenses", see 7 U.C.L.A. Law Review 463.

[8] California Penal Code Section 189: "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which

After unsuccessfully trying both defendants for first degree murder, the substantive charges of robbery and assault were filed against the petitioners, and a new public defender was appointed to defend the petitioners (R. 9, 28).

The function of the public defender is defined by statute[9] and case law.[10]

In the case of a conflict of interest of two or more defendants, the entire staff of the Public Defender is considered as one attorney.[11]

When Mr. Atkins came to court on Sepetember 30, 1959, the date set for trial, he had admitted (R. 29) that he had been in trial daily since August 21, 1959, the date of plea of the defendants (R. 9), and had no opportunity to prepare the case, or the defense, or to read the transcripts of the murder trial. The prosecuting attorney, on the other hand, had been through both murder trials and was fully prepared to prosecute petitioners on testimony which he had heard twice before (R. 32-33). His argument to the court, against a continuance, was not that Mr. Atkins was not prepared, but that the defendants were! (R. 32-35) And, in the same breath as it were, denied that the two defendants one (Meyes) convicted of murder and with three prior convictions of burglary and robbery (R. 7-8) had no conflict of interest with his co-defendant who had no felony convictions because *both defendants had previ-*

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is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree."

[9] California Government Code Section 27,700 et seq.

[10] *People* v. *Kerfoot*, *infra*, note 12 and *People* v. *Mattson*, *infra*, 51 Cal. 2d 717, 336 P. 2d 937 (1959).

[11] *People* v. *Kerfoot*, *ibid.*

ously denied participation in the offenses that were now being charged against them! (R. 35)

ARGUMENT

A.

There Was a Definite Conflict of Interest Between the Defendants and, as a Matter of Due Process of Law, the Defendant Douglas Was Entitled to Representation by Either Counsel of His Own Choosing or by Court Appointed Counsel; and a Reasonable Continuance for That Purpose Was Required.

The request of the public defender and his representation to the court was as follows (R. 36):

"Mr. Atkins: Your Honor, first off, let me make something clear. I am not asking for a dismissal of the charges. I am asking for a continuance. Mr. Carr says, 'What has happened?' He said, 'Past history proves that no conflict appears.'

"What has happened since then? Well, something has happened since then, your Honor. Douglas was acquitted and Bennie Meyes was convicted. Now, I can defend both of them, but I am at a disadvantage in that if I defend both of them the stigma of the murder conviction as to Bennie Meyes—I have to talk out of one side of my mouth as to Bennie Meyes and out of the other side of my mouth as to Mr. Douglas.

"The Court: I do not know why—

"Mr. Atkins: I do not think that it is fair for Mr. Douglas. He should have an attorney who would represent him and him alone who can make the best use of the fact that an acquittal was earned on his behalf in the murder trial. That is a conflict. I submit your Honor that

that is a conflict in presenting the case which should be obvious to anyone that two lawyers are necessary.

"The Court: All right, the motion is denied."

The Record at Pages 36-37 indicates the public defender's request for a continuance and the reasons therefor on behalf of both petitioners:

"Mr. Atkins: Your Honor, on behalf of Mr. Douglas, he has asked me to make a motion for a continuance so that he may retain the attorney which he talked to show name is Leo Brennan, and has made arrangements to have him come in and defend him; and he wishes me to bring that up, to bring that to your Honor's attention. He has been in touch with Leo Brennan and has made arrangements to have Leo Brennan defend him.

"The Court: Well, this matter has been on the calendar before, and there have been three continuances before, three motions for continuance before. I cannot hear these matters piecemeal. The motion is denied.

"Mr. Atkins: On behalf of Bennie Meyes, Mr. Meyes requests a continuance. He does not feel that I am adequately prepared for trial and requests a continuance for that reason and wishes to address the Court at this time.

"The Court: The motion will be denied. Swear the jury."

The facts in the instant case are, though not on "all fours", almost uncanny in their similarity to the facts of another California case, *People* v. *Kerfoot*, 184 Cal. App. 2d 622.[12]

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[12] *People* v. *Kerfoot*, 184 Cal. App. 2d 622, 7 Cal. Rptr. 674, filed September 16, 1960 District Court of Appeal, Second District Division One. Hearing den. November 10, 1960.

In the *Kerfoot* matter, attorney Harold J. Ackerman, a private practicing attorney was appointed by Division One to represent

In the *Kerfoot* case, two defendants Demes and Kerfoot were charged jointly with murder. They were at one time represented by private counsel. The first case ended in a mistrial. On the retrial, the public defender was appointed to represent both the defendants. The public defender represented to the court that there was a possibility of a conflict of interest between the defendants, but the court found there was no such conflict (the court having heard the case before). Again, in the *Kerfoot* case on the date set for trial, the public defender stated he would be willing to represent both of the defendants in the case; however, that he had just completed a protracted case on the previous Friday, that he had no opportunity to prepare, and that again, there was a possibility of conflict of interest between the defendants. The public defender stated he had not read the prior transcripts of the trial, that the prosecution was asking for the death penalty, that Kerfoot had told him that the prosecution contended that he had committed the actual murder and that Demes was supposed to have driven the get-away car—that in any argument on penalty, one attorney would be at a severe disadvantage if he had to argue penalty as to both defendants, that under some theories, Demes could be deemed less culpable. The public defender stated that he would represent either or both of the defendants, but if he did so, he would have to have a continuance to prepare for trial. The deputy district attorney

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the defendant Kerfoot on appeal. In the instant case, the opinion was filed December 29, 1960, by Division Three of the same appellate district. All three divisions and justices (there are now four divisions) occupy offices in the same building and hear arguments in the same court room.

The trial in the *Kerfoot* case was set for September 14, 1959, just sixteen days before the instant case went to trial, and although a different judge (William E. Fox) tried the case, the criminal departments of the Superior Court were all located on the seventh and eighth floors of the Hall of Justice, Los Angeles, California.

stated that he felt there was no conflict of interest. The judge indicated that if the defendants were found guilty of murder in the first degree, he could then perhaps appoint another attorney for Demes at the penalty trial. The judge inquired of Kerfoot as to whether he wanted the public defender to represent him, and Kerfoot replied "No Sir". The judge then said, "You will not accept the services of [the public defender] who the court has heretofore appointed?" and Kerfoot answered, "That is right. I don't want no public defender, I want private counsel". The judge apparently did not remember that he had theretofore relieved the public defender of representing the defendants. Demes was then asked if such was his feeling too, and he said it was, and further said, "There is a conflict of interest. So far as I am concerned, I want separate counsel from Mr. Kerfoot". (For further details, see *People* v. *Kerfoot*, 184 Cal. App. 2d 622, 7 Cal. Rptr. 674, 678-680.)

In supporting its proposition that there had been a conflict of interest, the court in the *Kerfoot* case cites extensively from this court's opinion in *Glasser* v. *United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680, and *Johnson* v. *Zerbst*, 304 U.S. 458, 462, 463, 58 S. Ct. 1019, 1022, 82 L. Ed. 1461 [1465, 1466]. It would be an idle act to repeat back to this Court what it has already said with regard to the application of the Fifth and Sixth Amendments and the Fourteenth Amendment to the Constitution as applied in *Powell* v. *Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527.

In the *Kerfoot* case, the Court stated (7 Cal. Rptr. 674, 686): "We call particular attention to that part of the *Glasser case* which indicates that even in the absence of a conflict of interest, the same rule would apply since counsel's "effectiveness" *might be impaired by adding to his burden the representation of another co-defendant.*" (Emphasis added by the Court) . . . "

In the case of *People* v. *Lanigan*, 22 Cal. 2d 569, 140 P. 2d 24, 148 A.L.R. 176 cited in the *Kerfoot* case, the court pointed out that the right as provided by the Sixth Amendment to the United States Constitution is protected in California by Article I, Section 13 of the California Constitution and further stated in effect that they adopted the philosophy stated in the *Glasser* case.

The *Lanigan* case stated in 22 Cal. 2d at Pages 576-577, 140 P. 2d at Page 29: " . . . and counsel should not be hampered or embarrassed by being compelled to choose one course as against the other because of the action taken by the court."

In a further comparison of the instant case with the *Kerfoot* case, it should be remembered that the public defender in *Kerfoot* asked for a continuance because he was not prepared and had not read the transcripts. The court in *Kerfoot* said in 7 Cal. Rptr. 674 at Page 689: " . . . If the public defender, a skilled, trained and experienced lawyer, needed time to prepare, how much more so did appellant need time within which to at least read the transcript and understand what had been testified to in the prior case. A reading of the transcript at the second trial shows that there were many situations where intelligence cross-examination would have been of great assistance in ascertaining the truth. Whether the truth would have been of benefit or detriment to the appellant it cannot be said, because as it was, there was *no* cross-examination. See *People* v. *Mattson*, 51 Cal. 2d 777, footnote at Page 790, 336 P. 2d 937, for a statement of the right to counsel and the time within which to prepare a defense." . . . "

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[1] *People* v. *Mattson*, 336 P. 2d 937, 947 footnote 5 :

[2] Where federal due process requires appointment of counsel, the state court's appointment must be effective. It must afford counsel time and opportunity and impose upon him the duty to

B.

The Petitioners Were Denied Assistance of Counsel at the Appellate Level and Due Process of Law (Petitioner Douglas in Two Respects).

Petitioners each filed a separate Notice of Appeal. They also filed a request for counsel on appeal, R. 18, although the record does not specifically state that the defendants were indigent, the fact that they had a public defender represent them at trial and that they were imprisoned at the time the request was made would seem to indicate that they were indigent. Furthermore, the Request for Counsel filed with the District Court of Appeal carry with them an affidavit *in forma pauperis*.

In 1956, this Court established the general rule in *Griffin v. Illinois* (1956), 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585, 55 A.L.R.2d 1055, reh. den. 351 U.S. 968, 100 L. Ed. 1480, 76 S. Ct. ——, that an indigent convicted of crime is, as a matter of constitutional law, entitled to state aid in obtaining appellate review of trial errors where review of such errors is available to persons able to pay the attendant expenses.

It would thus seem that under the *Griffin* rule, petitioner Douglas was denied his constitutional right to a record on

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consult with defendant and investigate and prepare the case for trial" citations omitted. The accused has the right to counsel at every step of the proceedings leading to conviction, not only to effective representation at the trial on the merits but also to the advice of counsel as to whether a plea of guilty is appropriate citations omitted, and, where objections must be raised before the cause is at issue, to appointment of counsel at a time which will enable defendant to make such objections if none omitted.

"Similarly the California right to counsel requires an effective not a mere pro forma appointment. Counsel must be afforded time and opportunity for investigation and consultation with defendant in the preparation of the defense citations omitted

appeal and due process of law and equal protections under the Fifth and Fourteenth Amendments to the United States Constitution.

The second implication of the *Griffin* case enunciated as a comment in 55 A.L.R. 2d 1072, 1085 is as follows: " . . . the essence of the Supreme Court's ruling in the Griffin case is that a person convicted of a crime cannot be put to a substantial disadvantage with respect to appellate review of his conviction merely because he is poor. Surely a substantial disadvantage exists where an appellant, because lacking the money with which to employ counsel, is forced to appear pro se before the appellate court. Thus, the establishment of the rule that a state must, as a matter of federal constitutional law, provide indigents with the assistance of counsel to prosecute appeals in criminal cases would appear to be no more than a logical extension of the Griffin doctrine."

The holding of the *Griffin* case has been affirmed by this Court, in *Burns* v. *Ohio*, 360 U.S. 252, 3 L. Ed. 2d 1209, 79 S. Ct. 1164, and reiterates the caveat of *Griffin* that "We are confident that the State will provide corrective rules to meet the problem which this case lays bare."

Just as the Illinois Supreme Court in the *Griffin* case had broad power to promulgate rules of procedure and appellate practice, so does the Supreme Court of the State of California.[14] The California Supreme Court in the case

[14] Section 1247k of the California Penal Code provides as follows:

"The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal, and for the time and manner in which the records on such appeal shall be made up and filed, in all criminal cases in all courts of this State.

"The Judicial Council shall report the rules prescribed by it to the Legislature on or before March 31, 1943.

"The rules reported as aforesaid shall take effect on July 1, 1943, and thereafter all laws in conflict therewith shall be of no

of *People* v. *Hyde*, 51 Cal. 2d 152, 154, 331 P. 2d 42 promulgated the following rule: "It is our opinion that the appellate courts upon application of an indigent defendant who has been convicted of a crime, should either (1) appoint an attorney to represent him on appeal or (2) make an independent investigation of the record and determine whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed. This investigation should be made solely by the justices of the appellate court. After such investigation, appellate court should appoint counsel if, in their opinion, it would be helpful to the defendant or the court, and should deny the appointment of counsel only if in their judgment such appointment would be of no value to either the defendant or the court".

This procedure has been followed in the California Courts, the instant case being an example of the procedure. See *People* v. *Brown*, 55 Cal. 2d 64, 375 P. 2d 1072, 9 Cal. Rptr. 816, 819 (concurring opinion of Traynor, *Justice*) wherein the Justice stated that: "It is my opinion, however, that the holding in People v. Hyde, 51 Cal. 2d 152, 154, 331 P. 2d 42, should be expanded to require the appointment of counsel on appeal for all indigent defendants convicted of felonies". The footnote of Justice Traynor goes extensively into the question of the problem since the *Griffin* case.

Justice Traynor then goes on to say: "The question calls for resolution even though we appointed counsel to represent defendant in this court. The question cannot re-

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further force or effect." (Added Stats. 1941, c. 562, p. 1945, § 1. As amended Stats. 1943, c. 4, p. 111, § 2, effective Jan. 14, 1943.)"

The rules on appeal for the Supreme Court and District Courts of Appeal of the State of California may be found in West's Annotated California Code, Volume 23, "Civil and Criminal Rules".

main in abeyance. This very case illustrates the recurring practice of the District Court of Appeal, Second District, Division Three, of referring the question of the appointment of counsel to the local bar association committee (see *People* v. *Logan*, 137 Cal. App. 2d 331, 332, 290 P. 2d 11), and a consequent countervailing practice of this Court to then grant a hearing even on its own motion whenever there has been no appointment of counsel. There would be no end to such wasteful procedure were the question deemed moot each time this Court granted a hearing and appointed counsel. The question should be settled in the interest of effective appellate court administration."

Further, Justice Traynor states: "Denial of counsel on appeal would seem to be a discrimination at least as invidious as that condemned in *Griffin* v. *People of State of Illinois, supra.* See *State* v. *Delaney, Or.*, 332 P. 2d 71, 74-81; The Effect of *Griffin* v. *People of State of Illinois* on the States' Administration of the criminal law, 25 U. of Chi. L. Rev. 161, 170-171; Appointment of Counsel for Indigent defendants on Criminal Appeals, 1959 Duke L.J. 484, 488-489 . . . "[15]

In the case of *People* v. *Gullick* (1961), 55 Cal. 2d 540, 360 P. 2d 62, 11 Cal. Rptr. 566, Justice Shauer of the California Supreme Court in his dissenting opinion indicates that the California Supreme Court, on a motion by the defendant Gullick to augment the record when he was without counsel, not only granted the motion but transferred the cause to be heard by itself and appoint counsel for Gullick (11 Cal. Rptr. 574, 576).

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[15] Note the District Court of Appeal in this matter was the same Division Three referred to by Justice Traynor in the instant case. Justice Traynor thought that the petition for hearing in the Supreme Court should be granted (R. 194). The *Brown* case was filed December 29, 1960, the Opinion of the District Court of Appeal in the instant case on December 22, 1960.

Aside from the actions of the California Supreme Court, in following the mandates of the *Griffin* case, the District Courts of Appeals have been rather consistent in denying that appointment of counsel is a matter of right on appeal.

People v. *Gillette*, 171 Cal. App. 2d 497, 341 P. 2d 398;

People v. *Williams*, 172 Cal. App. 2d 345, 341 P. 2d 741;

People v. *Lenaberry*, 176 Cal. App. 2d 588, 1 Cal. Rptr. 757;

People v. *Vigil*, 11 Cal. Rptr. 319.

The latest case (December 27, 1961) as of this writing is *People* v. *Cole*, 17 Cal. Rptr. 686, wherein the District Court of Appeal, Second Appellate District, Division Three, stated: "Upon his application for appointment of counsel, we read the records, determined the appeals to be without merit and denied the application. Defendant was notified, was given time to file a brief and has filed none".

In the Federal Courts, it has been held very recently that the right afforded by the Sixth Amendment to defendants in federal criminal proceedings to the aid of counsel extends to every phase of the appeal including the preliminary phase of obtaining permission to appeal *in forma pauperis* and that the court may not decline to appoint counsel in connection with the preliminary phases on the ground that the record reveals no meritorious issue, inasmuch as counsel may search the record for issues more meritorious than those suggested in the original application.

Anderson v. *Heinze* (C.A. 9), 258 F. 2d 479, cert. den. 358 U.S. 889, 3 L. Ed. 2d 116, 79 S. Ct. 131.

If the rule of the *Griffin* case that the right to counsel, due process and equal protections extends to every phase

of a criminal case, than the rule laid down in *Anderson* v. *Heinze, supra*, is more consonant with this Court's holding than that of the rule laid down by the California Supreme Court that in the alternative of appointment of counsel, the appellate court should review the record and determine whether or not appointment of counsel would be beneficial to the defendant.[18] An example of the fallacy of the California Supreme Court in believing that due process can be afforded an indigent defendant where an appellate jus-

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[18] *People* v. *Oliver* (1961), 55 Cal. 2d 908, 361 P. 2d 592, 12 Cal. Rptr. 865, 870 (footnote 2 of Justice Shauer concurring and dissenting opinion).

"I recognize that on appeal the defendant is no longer presumed to be innocent. To the contrary, his guilt has been established and every presumption is in favor of the regularity of the proceedings in the trial court. I think, too, that those able justices of the District Court of Appeal who voluntarily undertake the added burden of independently researching the record for possible flaws in the judicial process as it has been applied to indigents, are to be commended for their devotion to the public interest. This devotion is so broad in scope that these justices give the skill and acumen of their seasoned experience to protecting the rights of the indigents, and at the same time to making unnecessary the expenditure of public funds which would ensue from the appointment of counsel, in cases wherein a paid attorney could accomplish nothing which would benefit the defendant, the state or the cause of justice. Those members of the Bar who (literally as amici curiae) likewise unselfishly aid the district courts in this work, are similarly to be commended.

"It bears emphasis that the duty assumed by the justices and the volunteer lawyers, is an exacting and onerous one. Under the majority decision in *People* v. *Hyde* (1958), 51 Cal. 2d 152, 154 [1], 331 P. 2d 42, it is, as I understand the opinion, the unspelled out but implied duty of the reviewing court (in cases wherein an indigent requests and is refused counsel) to examine the entire record (augmenting it if appropriate) to the end of reaching and manifesting a fully informed and confident conclusion that there has been neither a denial of due process nor error which is prejudicial within the compass of *People* v. *Watson* (1956), 46 Cal. 2d 818, 835-836 [12], 299 P. 2d 243. Only when the record shows such exacting care is it immediately apparent to subsequently petitioned reviewing courts that the quality of justice on appeal for the indigent is of the same standard as for the opulent."

tice reviews the record can be seen from a review of the facts in the instant case.

When Mr. Atkins stated to the trial court, (R. 36[1]: " . . . I submit to your Honor that it is a conflict to [illegible] enting the case which should be *obvious* to anyone that two lawyers are necessary . . . ", his opinion of what was "obvious" was "obviously" not apparent to the trial court, the three justices sitting in Division Three of the District Court of Appeal or to six justices of the California Supreme Court.

The practice of the California courts of having the record reviewed by an appellate justice in lieu of appointment

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[1] To the everlasting credit of Deputy Attorney General Jack E. Goertzen who prepared the Respondent's Brief to the District Court of Appeal in the instant case, the subject of conflict of interest was raised and presented to the District Court of Appeals as follows (Respondent's Brief Page 42 et seq.): "However, appellants failed to present one point that deserves a consideration of this Honorable Court. That point is whether or not the trial judge should have granted the motion of the public defender on behalf of appellant Douglas to appoint separate counsel for Douglas . . . Said motion was connected with a motion for continuance, and it was denied." Mr. Goertzen then sets forth in his brief the material set forth at Page 36 of the Record.

Respondent's brief was filed with the District Court of Appeal, Second Appellate District, Division Three, September 8, 1960 (R. 182), and of course the *Kerfoot* decision was filed September 16, 1960 (footnote 12, *supra*). Argument in the instant case was on December 21, 1960 (R. 182) after a hearing in the California Supreme Court had been denied. Since argument was waived and the cause submitted, Mr. Goertzen had no opportunity to present the *Kerfoot* case to the Court although the writer is informed and sincerely believes that this was done informally.

In any case, Mr. Goertzen did submit to the Court the *Lanagan* case cited in the *Kerfoot* case, but pointed out that there might be a distinction in that "appellant Douglas did not in good faith want a separate attorney, but in effect merely wanted to stall the proceedings" (respondent's brief Page 49) citing as authority therefor the statement of Douglas (R. 173), "I was prepared myself, your Honor, but the counsel was not prepared. With proper counsel, I would have gladly been ready for trial. I, myself, was prepared. He was not prepared."

of counsel has further demerits. Without a doubt, the appellate courts of California and justices thereof are conscientious to a fault. On the other hand, to review a record in advance of briefs being filed by the appellant or appellee to determine whether there is sufficient error to merit the appointment of counsel, presupposes a judicial determination of the merits of the case where the request for appointment of counsel is denied. Thus, in the instant case, the District Court of Appeal, on January 7, 1960, filed its memorandum opinion in which it was indicated that the Court felt that the defendants themselves were responsible for their lack of counsel. Another application for counsel was denied on April 12, 1960. On May 17, 1960, the Appellant's Opening Brief was filed, and on September 8, 1960, the Respondent's Brief was filed. In effect, the District Court of Appeal had made its mind up that there had been no error with respect to the denial of the assistance of counsel, and their predetermination of that issue is apparent from a reading of the opinion wherein not one word of discussion regarding "conflict" can be found.

It is respectfully submitted that the right of a defendant to have counsel on appeal is a concomitant expression of the rule of the *Griffin* case that he has a right to a transcript of the record. As pointed out by Justice Shauer (Footnote 16, *supra*) when a defendant appeals, he is already presumably guilty. It is difficult enough for an appellate attorney to search a record to find reversible error where it is provided in California Constitution Article VI, Section 4½ that "no judgment shall be set aside, or new trial granted, in any case on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any errors to any matter of procedure, unless, after an examination of the entire cause, including the evidence,

the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice"; and to impose such a burden on a lay defendant is an unreasonable burden. It is just this type of unreasonable burden which appellant submits is prohibited in our constitutional form of government under the general heading of "due process of law" or "fair play".

Due process forbids a state court to deny an indigent defendant the right to counsel *after* he has been convicted where the presumption of innocence has shifted; he is more than ever in need of the protection of counsel. To hold otherwise would be the pejorative of the protections "implicit in the concept of order to liberty".

Palko v. *Connecticut*, 302 U.S. 319, 325.

Conclusion

There is no question, whatsoever that the petitioners had a conflict of interest before, at and after the time for trial. The Canons of legal ethics and constitutional mandate require the State to protect their right to have separate counsel and to a reasonable continuance in order that their counsel might have prepared for trial. The proceedings at the appellate level in the California courts were equally without validity, and the error of the trial court was compounded by the reviewing courts of the State of California.

The convictions and judgments, under the circumstances here, must be reversed.

Respectfully submitted,

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